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5 **UNITED STATES DISTRICT COURT**
6 EASTERN DISTRICT OF CALIFORNIA
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8 RAMON NAVARRO LUPERCIO,
9 Plaintiff,
10 v.
11 LOPEZ, *et al.*,
12 Defendants.

Case No. 1:21-cv-00240-NONE-BAM (PC)

**AMENDED FINDINGS AND
RECOMMENDATIONS REGARDING
DISMISSAL OF ACTION, WITH
PREJUDICE, FOR THE FAILURE TO STATE
A COGNIZABLE CLAIM AND AS
FRIVOLOUS**

(ECF No. 14, 15, 18)

FOURTEEN (14) DAY DEADLINE

15 Plaintiff Ramon Navarro Lupercio (“Plaintiff”) is a state prisoner proceeding *pro se* and *in
16 forma pauperis* in this civil rights action under 42 U.S.C. § 1983. Plaintiff filed a first amended
17 complaint without first waiting for screening of the original complaint. Plaintiff’s first amended
18 complaint, filed on March 3, 2021, is currently before the Court for screening. (Doc. 15.)

19 **I. Screening Requirement and Standard**

20 The Court is required to screen complaints brought by prisoners seeking relief against a
21 governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C.
22 § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous
23 or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary
24 relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b).

25 A complaint must contain “a short and plain statement of the claim showing that the
26 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
27 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
28 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*

1 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While a plaintiff's allegations are taken as
2 true, courts "are not required to indulge unwarranted inferences." *Doe I v. Wal-Mart Stores, Inc.*,
3 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

4 To survive screening, Plaintiff's claims must be facially plausible, which requires
5 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable
6 for the misconduct alleged. *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Moss v. U.S. Secret*
7 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant acted unlawfully
8 is not sufficient, and mere consistency with liability falls short of satisfying the plausibility
9 standard. *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Moss*, 572 F.3d at 969.

10 **II. Plaintiff's Allegations**

11 Plaintiff is currently out of custody. The events in the first amended complaint are alleged
12 to have occurred during Plaintiff's criminal prosecution. Plaintiff names as defendants: (1) Mark
13 Lopez, Detective with the Visalia Police Department, and (2) Grimes, Detective with the Visalia
14 Police Department. Plaintiff is alleging that the Detectives engaged in a conspiracy to manipulate
15 evidence and falsify evidence. The Court is unable to decipher the complaint's allegations, but the
16 basic premise is that fabricated evidence was used to convict him.

17 Plaintiff seeks immediate release from prison and compensatory damages.

18 **III. Plaintiff's Claims are Barred**

19 Petitioner was convicted on April 25, 2003, following a jury trial in Tulare County
20 Superior Court, of attempted murder with a firearm enhancement. The court sentenced him to
21 serve a term in state prison of 32 years to life. See *Lupercio v. Gonzalez*, No. 1:08-CV-0012 LJO
22 WMW (HC), 2008 WL 5156646, at *1 (E.D. Cal. Dec. 9, 2008), report and recommendation
23 adopted, No. 1:08-CV-0012 LJO WMW (HC), 2009 WL 159392 (E.D. Cal. Jan. 22, 2009) (ruling
24 on the federal habeas corpus petition.) Plaintiff filed a direct appeal of his conviction and on
25 November 23, 2004, the California Court of Appeal, Fifth Appellate District ("Court of Appeal"),
26 affirmed the judgment. *Id.* Petitioner filed a petition for review with the California Supreme
27 Court, which the court denied on February 2, 2005. *Id.* Plaintiff filed a federal habeas corpus
28 petition on December 13, 2007, which was denied on January 22, 2009. *Id.*

1 Plaintiff has filed at least three prior §1983 civil rights complaints against persons or
 2 entities involved in his criminal conviction. Each time, the complaints were dismissed as *Heck*
 3 barred. A § 1983 action for damages will not lie where “establishing the basis for the damages
 4 claim necessarily demonstrates the invalidity of the conviction.” *Heck v. Humphrey*, 512 U.S.
 5 477, 481–482, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Plaintiff may not pursue a § 1983
 6 damages for this claim until Plaintiff can prove “that the conviction or sentence has been reversed
 7 on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to
 8 make such determination, or called into question by a federal court’s issuance of a writ of habeas
 9 corpus.” *Id.* at 487. *See Luperio v. Visalia Police Department*, No. 1:10-cv-02314-AWI-GBC
 10 (PC) (Doc. 12) (E.D.Cal. May 5, 2011) (finding as *Heck* barred Plaintiff’s challenge to allegedly
 11 false statements that were given to the trial court that ultimately led to Plaintiff’s conviction),
 12 findings and recommendations adopted August 10, 2011; *Luperio v. Visalia Police Dep’t*, No.
 13 1:13-CV-01028-LJO, 2013 WL 5375639, at *3 (E.D. Cal. Sept. 24, 2013) (“Specifically, the
 14 Court noted that Plaintiff’s complaint in this action was largely identical to the claims Plaintiff
 15 attempted to raise in a prior action, *Luperio v. Visalia Police Department*, case number 1:10-cv-
 16 02314-AWI-GBC. Plaintiff’s prior case was dismissed as barred by the *Heck* doctrine.”),
 17 findings and recommendations adopted October 31, 2013, aff’d, Case No. 13-17363 (9th Cir.
 18 Sept. 25, 2014); *Luperio v. Visalia Police Dep’t*, No. 1:18-CV-0036 LJO EPG, 2018 WL
 19 2229210, at *2 (E.D. Cal. May 15, 2018) (his claim for damages arising from his criminal
 20 conviction under § 1983 is barred by *Heck* and must be dismissed).

21 Other attempts by Plaintiff to challenge his conviction by §1983 have been rejected. See
 22 *Luperio v. Heusdens*, No. 1:13-CV-00628-LJO, 2013 WL 3341026, at *3 (E.D. Cal. July 2, 2013)
 23 (the Section 1983 claims against all Defendants are not cognizable because Defendants did not
 24 act under the color of state law in representing Plaintiff in the underlying criminal action or the
 25 subsequent appeal process.); *Luperio v. Mendoza*, No. 1:21-CV-580-DAD-HBK, 2021 WL
 26 2915053, at *1 (E.D. Cal. July 12, 2021), report and recommendation adopted, No. 1:21-CV-
 27 00580 DAD HBK, 2021 WL 3363527 (E.D. Cal. Aug. 3, 2021) (§1983 not available for Plaintiff
 28 to show that Mr. Mendoza provided false testimony in his underlying conviction.)

1 Plaintiff previously sought federal habeas relief in this Court with respect to the same
 2 conviction numerous, successive times. Thus, the Court need not address Plaintiff's "habeas
 3 corpus petition" (Doc. 14), because the instant petition is yet another "second or successive"
 4 petition under 28 U.S.C. § 2244(b). *See Lupercio v. Gonzalez*, No. 1:08-cv-00012-LJO-JLT
 5 (dismissed as untimely); *Lupercio v. Sherman*, No. 1:15-cv-00915-DAD-MJS (dismissed as
 6 successive); *Lupercio v. Sherman*, No. 1:15-cv-01834-DAD-MJS (same); *Lupercio v. Sherman*,
 7 No. 1:16-cv-00233-DAD-MJS (same); *Lupercio v. People of the State of California*, No. 1:20-cv-
 8 00925-DAD-JDP (same); *Lupercio v. Visalia Police Dep't*, No. 1:21-CV-00306 JLT HC, 2021
 9 WL 949434, at *1 (E.D. Cal. Mar. 12, 2021), report and recommendation adopted, No. 1:21-CV-
 10 0306 DAD JLT(HC), 2021 WL 1611613 (E.D. Cal. Apr. 26, 2021) (same). *See McNabb v. Yates*,
 11 576 F.3d 1028, 1030 (9th Cir. 2009) (holding "dismissal of a first habeas petition for untimeliness
 12 presents a 'permanent and incurable' bar to federal review of the underlying claims," and thus
 13 renders subsequent petitions "second or successive"). Petitioner makes no showing that he has
 14 obtained prior leave from the Ninth Circuit to file his successive petition. Therefore, this Court
 15 has no jurisdiction to consider Petitioner's renewed application for relief under 28 U.S.C. § 2254
 16 and must dismiss the petition. *See Burton v. Stewart*, 549 U.S. 147, 157 (2007).

17 Based on the above, Plaintiff's claim for damages under § 1983 is barred by *Heck* and
 18 must be dismissed. Because Plaintiff cannot "demonstrate that [his] conviction or sentence has
 19 already been invalidated," *Heck*, 512 U.S. at 487, there is no way to cure this defect on
 20 amendment, and dismissal must be without leave to amend and with prejudice. The Court finds
 21 that Plaintiff's claims in this action are not capable of being cured by further leave to amend.

22 Finally, in light of Plaintiff's repeated filing of lawsuits attempting to challenge his
 23 conviction, and repeated dismissals of these actions as barred by *Heck*, the Court finds that this
 24 action also should be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e). *See Cato v. United*
 25 *States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995) (duplicative lawsuits filed by a plaintiff proceeding
 26 in forma pauperis are subject to dismissal as either frivolous or malicious under 28 U.S.C.
 27 § 1915(e)) (citing *Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (recognizing Congress's concern
 28 that "a litigant whose filing fees and court costs are assumed by the public, unlike a paying

1 litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive
2 lawsuits”)).

3 **IV. Conclusion and Recommendation**

4 As set forth above, the Court finds that Plaintiff's first amended complaint fails to state
5 any cognizable claims, and that this action is frivolous. The Court further finds that Plaintiff's
6 claims are not capable of being cured by granting further leave to amend.

7 Based upon the foregoing, it is HEREBY RECOMMENDED that Plaintiff's complaint be
8 DISMISSED WITH PREJUDICE for failure to state a cognizable claim and as frivolous pursuant
9 to 28 U.S.C. § 1915(e).

10 These Findings and Recommendation will be submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
12 (**14** days after being served with these Findings and Recommendation, Plaintiff may file written
13 objections with the Court. The document should be captioned “Objections to Magistrate Judge's
14 Findings and Recommendation.” Plaintiff is advised that failure to file objections within the
15 specified time may result in the waiver of the “right to challenge the magistrate's factual
16 findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v.*
17 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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19 IT IS SO ORDERED.

20 Dated: August 20, 2021

21 /s/ *Barbara A. McAuliffe*
22 UNITED STATES MAGISTRATE JUDGE

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